FILE COPY

OCT 7 1945

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 52.

ARCH R. EVERSON, *Appellant*,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL., *Appellees*.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE JOINT CONFERENCE COMMITTEE ON PUBLIC RELATIONS REPRESENTING THE SOUTHERN BAPTIST CONVENTION, THE NORTHERN BAPTIST CONVENTION, THE NATIONAL BAPTIST CONVENTION, INC. AMICI CURIAE.

E. HILTON JACKSON,
626 Woodward Building,
Washington 5, D. C.,
Attorney for the General Conference of Seventh-Day Adventists and the Joint Conference Committee on Public Relations Representing the Southern Baptist Convention, the Northern Baptist Convention, the National Baptist Convention, the National Baptist Convention, Inc., Amici Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
PRELIMINARY STATEMENT	2
THE STATUTE	2
THE FACTS	3
THE ISSUE	4
THE ARGUMENT	4

TABLE OF CASES CITED.

Adams v. County Commissioners, 26 Atl. 2d 337 ..... 8, 13
Bennett v. La Grange, 153 Ga. 428, 22 L. R. A. 1312 6
Board of Education v. Wheat, 199 Atl. 628 ..... 8, 13
Board of Education v. Barnette, 319 U. S. 624 ..... 5, 16
Borden v. Louisiana Board, 168 La. 1030 8
Bowker v. Baker, 167 Pac. 2d 260 ..... 13, 14
Cantwell v. State, 310 U. S. 296 5
Chance v. Mississippi Board, 200 So. 706 ..... 8, 10
Cochran v. Louisiana Board, 168 La. 1030 ..... 8, 11
Cole v. LaGrange, 113 U. S. 1 6
Curtis v. Whipple, 25 Wisc. 350 6
Douglas v. Jeannette, 319 U. S. 156 5
Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112 .. 6
Home Building Association v. Blaisdell, 290 U. S. 434 .. 15
Green v. Frazier, 253 U. S. 233 6
Gurney v. Ferguson, 122 Pac. 2d 1002 ..... 8, 9, 12, 18
Jacobson v. Mass., 197 U. S. 25 15
Jenkins v. Anderson, 103 Mass. 94 6
Judd v. Board of Education, 278 N. Y. 200 ..... 8, 9
Knowlton v. Baumhover, 182 Iowa 691 18
Lochner v. New York, 198 U. S. 45 15
Loan Association v. Topeka, 20 Wall 655 6
Lowell v. Baston, 111 Mass. 454 7

Page

Marsh v. Alabama, U. S. Supreme Court, Jan. 7, 1946 . . . 15, 17
Mitchell v. Con. School Dist., 135 Pac. 2d 79 . . . . 8, 9, 12, 15
Murdoch v. Pennsylvania, 319 U. S. 105 5
Nichols v. Henry, 191 S. W. 930 . . . . . 13, 14
Parkersburg v. Brown, 106 U. S. 487 6
Schneider v. Irvington, 308 U. S. 147 . . . . . 5, 13
Sherrard v. Jefferson County Board, 294 Ky. 469 . . 8, 12, 14
Smith v. Donahue, 195 N. Y. 5, 715 10
State ex rel Traub v. Brown, 172 Atl. 835 . . . . . 8, 9, 12
Thompson v. Con. Gas Utilities Co., 300 U. S. 55 6
Von Straton v. Milquet, 180 Misc. 109 8
Williams v. Board of Trustees, 173 Ky. 708 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 52.

ARCH R. EVERSON, *Appellant*,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL., *Appellees*.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE JOINT CONFERENCE COMMITTEE ON PUBLIC RELATIONS REPRESENTING THE SOUTHERN BAPTIST CONVENTION, THE NORTHERN BAPTIST CONVENTION, THE NATIONAL BAPTIST CONVENTION, INC. AMICI CURIAE.

This brief Amici Curiae is filed with the consent of counsel for appellant and for appellees.

The organization of the Seventh Day Adventists maintains in this country and Canada 2713 Church organizations and 2518 ministers and Bible instructors; together with elementary schools, academies and colleges, including a medical college, with a student capacity above elementary grades of 16,945. Other Christian activities include the maintenance of fifteen sanitariums and hospitals scattered over the United States. These activities are supported by its membership.

The Joint Conference Committee represents the four Conventions with a membership of approximately 14,000,000

and 65,000 churches. One hundred and thirty (130) schools and colleges are maintained with a student body of 52,000 apart from many other activities including orphan asylums and hospitals. These activities are voluntarily supported by the membership.

IMPORTANCE OF THE QUESTION.

It may be said that the interest of the organizations is specific, but also the issue is of vital concern to all religious groups calling for a pronouncement by this Court as to whether the factual situation presented constitutes an invasion of the time-honored doctrine of the separation of Church and State safeguarded by the Constitution. The question is thus squarely presented here for the first time, whether a state may, consistently with the bill of rights of the Constitution, give aid or support to religious organizations conducting schools, teaching religion, as well as other subjects, by payment, out of funds raised by taxation, to the parents of children who elect to send their children to religious schools, for transportation to such schools (in this instance to parochial schools of the Catholic Church) under the sole control of church authorities and without any control whatever by the public school authorities.

This is an appeal from a decision of the New Jersey Court of Errors and Appeals upholding the constitutionality of a resolution of the Appellee Board of Education and an act of the Legislature of the State of New Jersey, which resolution and Statute had been duly attacked in the pleadings as being an infringement of the Fourteenth Amendment of the Constitution of the United States and Appellant's rights thereunder. The pertinent portion of the statute in question (Chapter 191, Laws of 1941 of the State of New Jersey) is as follows:

> "18:14-8. Whenever in any district there are children living remote from any schoolhouse, the board of Education of the district may make rules and contracts for the transportation of such children to and from

school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

The resolution, based on said statute, is as follows:

"The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

THE FACTS.

Pursuant to said resolution, the appellee Board of Education authorized the payment of the cost of transportation of certain pupils from the Township of Ewing to certain Catholic parochial schools in Trenton in the amount of $8034.95, of which amount $357.74 was paid to the parents of twenty-one pupils so transported, five to elementary schools and sixteen to high schools. This payment was made from public moneys direct to parents, resident in the Township of Ewing, by way of reimbursement for the bus fares paid by their said children on public busses between the Township and the City of Trenton where the children attended said parochial schools. The religion of the church was taught in each of said schools as part of the curriculum. A priest of the church was the Superintendent of the Schools. The resolution in question made no provision for the transportation to private and sectarian schools other than Catholic Schools. The busses ran on

their usual schedules and added nothing to protection against traffic hazards. The Township public schools extend through the eighth grade. Public school children beyond these elementary grades are transported to Trenton or Pennington High Schools. Five of the parochial school children transported to Trenton were in the elementary grades, notwithstanding the fact that elementary free public schools were maintained and available to them in Ewing Township.

THE ISSUE.

The single issue presented here is whether, under the resolution and statute in question, the State of New Jersey, having a free public school system, supported by the State, to which all taxpayers have equal benefit, and to which all children have access in terms of equality, may, without violating the prohibitions of the Fourteenth and First Amendments of the Constitution of the United States, divert any of the tax funds to the support or aid, directly or indirectly, of private, parochial schools, by payments direct, or to patrons of admittedly private enterprises, where the entire control, curriculum, and tenets of faith and instruction of said parochial schools rest completely in the private hands of a sectarian, religious organization. In other words, may the state use said public funds to reimburse parents for bus fares paid by their children in attending private, religious schools where the State provides free public schools for the use of all of its children and free transportation thereto.

THE ARGUMENT.

It is submitted that the resolution and statute here in question violate the Fourteenth Amendment (a state may not deprive any person of property without due process of law), and by importation the First Amendment (Congress shall make no law respecting the establishment of religion), of the Constitution of the United States, for the following reasons:

1. This Court has repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First Amendment. While the Fourteenth Amendment deals only with the deprivation "of life, liberty or property without due process of law", the principles of the First Amendment—including the prohibition against any law respecting the establishment of religion—furnish a chart or yard-stick by which due process of law may be measured. A violation of the First Amendment to the Constitution is also a violation of the Fourteenth Amendment.

Douglas v. *Jeanette*, 319 U. S. 156.
Schneider v. *Irvington*, 308 U. S. 147.
Murdoch v. *Pennsylvania*, 319 U. S. 105.
Cantwell v. *State*, 310 U. S. 296.

In a later case, *Board of Education* v. *Barnette*, 319 U. S. 624, Mr. Justice Jackson amplifies these principles of construction in the following language:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assemply, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
>
> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the

due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

2. It has long been established by the adjudicated cases that taxes levied by a State must be for a public purpose. It is our contention that aid, direct or indirect, to private or sectarian schools is for a private as distinguished from a public purpose, and that public school funds may not be used to give financial support or aid to the private, parochial schools in question, not a part of the public school system of New Jersey, nor under its control. The leading case on the subject is *Loan Association* v. *Topeka*, 20 Wall. 655. A long line of decisions support this view: *Jenkins* v. *Anderson*, 103 Mass, 94; *Curtis* v. *Whipple*, 25 Wisc. 350; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Fall Brook Irrigation District* v. *Bradley*, 164 U. S. 112; *Green* v. *Frazier*, 253 U. S. 233; *Thompson* v. *Consolidated Gas Utilities Co.*, 300 U. S. 55, 80; *Benneft* v. *La Grange*, 153 Ga. 428, 22 L. R. A. 1312. These fundamental principles are so firmly established that it is not deemed necessary to extend this brief by elaborate quotations.

In the case at bar, the parents declined to use the free public school facilities provided by the State. They elected to send their children to private religious schools, not under the control of the State. They were paid direct by the State the cost of transporting their children to private parochial schools. This situation constituted a diversion of the school funds between a *public use* and a *private use* and is contrary to the fundamental principles of the Fed-

eral Constitution. The promotion of the interests of individuals, either in respect of their property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public, object. *Lowell* v. *Baston*, 111 Mass, 454. Among the uses which clearly fall on the private use side are those in which the public has neither control, as such, nor common and general access to or benefit from. In a word, the exercise of religious liberty, or the choice in the exercise of religious liberty, or the election to send children to religious schools may not be *subsidized* by the State, directly or indirectly. To do so would be to divert public property to private individuals without distinction as to need for charity and without any obligation of the State to such persons, the State having fully provided free schools open to all children. Again, the resolution in this case which authorizes transportation of children to Catholic schools, and makes no provision for transportation of children attending sectarian schools other than Catholic school, segregates the schools and the pupils designated as beneficiaries, and constitutes a taking of private property for a private use.

3. The resolution in question, as well as statute on which it is based, authorizing the use of tax moneys for the purpose of furnishing transportation of children attending sectarian schools is legislation respecting the establishment of religion and gives effective aid to such organizations in the teaching of their religious tenets and the extension of their religious ministrations. In so doing, such legislation contravenes the mandate of the separation of church and state inherent in the First Amendment, providing that there shall be no law respecting an establishment of religion, and the mandate of the Fourteenth Amendment that public funds shall be devoted wholly to a public use and not to a private use.

A major question has been raised in the state courts as to whether the furnishing of transportation to private

and parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools is based upon the so-called "child-benefit" theory, that is, that the transportation charges are for the benefit of the children rather than the schools.

The "child benefit" theory has received judicial support in two States (where the subject matter was the free distribution of certain textbooks to the children of the State generally. (*Bordon* v. *Louisiana State Board of Education,* 168 La. 1005; *Cochran* v. *Louisiana Board,* 168 La. 1030; *Chance* v. *Mississippi Board,* 200 Southern 706) and in one State, Maryland, (*Board of Education* v. *Wheat,* 199 Atl. 628 and *Adams* v. *County Commissioners,* 26 Atl. 2nd 377) where it was held that contributions from public money for transportation of children to parochial schools, either public school busses or parochial school busses, was constitutional.

The courts of six states have held that private and parochial schools attended by the children are beneficiaries of such legislation and that the legislation violates constitutional provisions which prohibit such benefactions.

> State ex rel, Traub v. Brown (1934, 6 W. W. Harr. 32, 36 Del. 181, 172 Atl. 835 (writ of error dismissed 39 Del. 187, 197 Atl. 478); Gurney v. Ferguson (1941), 190 Okla, 254, 122 Pac. 2d 1002; Judd v. Board of Education (1938), 278 N. Y. 200, 15 N. E. 2d 576; Mitchell v. Consolidated School District (Wash. 1943), 135 Pac. 2d 79; Williams v. Board of Trustees (1917), 173 Ky. 708, 191 S. W. 507, L. R. A. 1917D 453; Sherrard v. Jefferson County Board of Education (1943), 294 Ky. 469, 171 S. W. 2d 963; Von Straten v. Milquet (1923), 180 Wisc. 109, 192 N. W. 392.)

The following excerpts from four of these cases will disclose how strongly the courts have expressed themselves on this issue:

From *Mitchell* v. *Consolidated School District* (State of Washington Supreme Court):

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question."

From *Gurney* v. *Ferguson* (Oklahoma Supreme Court):

"It is argued that the present legislative act (providing for transportation of pupils attending public schools) does not result in the use of public funds for the benefit or support of this sectarian institution or schools 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child."

From State ex rel. *Traub* v. *Brown* (Delaware Superior Court):

"We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations. The relators cite in opposition to the above cases, the case of Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A. L. R. 1183. We are not impressed by the reasoning of this case."

From *Judd* v. *Board* (New York Court of Appeals):

"The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance, * * * Free transportation of pupils induces attendance at the school. The purpose of the transpor-

> tation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. * * * It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. * * * The courts of this country have been unanimous in prohibiting a use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools (citing cases) in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools."

In *Chance v. Mississippi State Textbook Board, supra,* the Court, in referring to *Smith* v. *Donahue,* 195 N. Y. S. 715, which held that the furnishing of textbooks and supplies to parochial school children was unconstitutional, said:

> "It can be seen that if it were necessary to differentiate the case as authority here, the furnishing of supplies in addition to books, as contrasted with the loaning of books with the right to compensation for damage or loss thereto, as in our statute, would furnish the necessary clue,"

thus indicating that the result in the *Chance case* would have been different, if supplies as well as textbooks had been furnished in that case.

Mr. Justice Case, in his dissenting opinion in the Court below, Record page 51, had this to say about the "child-benefit" theory:

> "Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. * * * I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools toward 'the advancement of education, the promotion of literacy and the health of safety' of the

pupils. Every step in the educational process is presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the State. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools."

The overwhelming weight of authority is that the "child-benefit" theory is an ingenious effort to escape constitutional limitations rather than a sound construction of their essential content and purpose. The editor of A. L. R. by way of resumé of the law in the cases reported and annotated in 63 A. L. R. 413, 118 A. L. R. 806 and 141 A. L. R. 1152 reaches this well supported conclusion:

> "It seems to have been held, in most cases that the transportation of pupils to a sectarian school amounts to the appropriation of moneys in aid of the school and is therefore unconstitutional."

4. The case of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370, 74 Law Ed 913, is not even persuasive in support of the issue in the case at bar. The facts are clearly different. In the *Cochran case*, the public school books were furnished to all of the children of the state. They were not books adapted to the religious schools, but were books in common use in the public schools. They were under the control of the State and were thereby loaned to the children and not given to them. The statute there under review contemplated that the same books that are furnished children attending public schools shall be furnished children attending private schools. After reviewing these limitations, inherent, in, and ascribed to, the statute by the Supreme Court of Louisiana, Chief Justice Hughes said:

> "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the State is exerted for a public purpose."

There is a striking analogy here to the status of public libraries. Certainly, there can be no serious doubt of the power of the state under the Fourteenth Amendment to purchase public school books and deposit them in agencies under its control, available to all of the children of the state, regardless of their religious creeds, and loan them to those desiring them.

But the case at bar presents an entirely different situation—where the state furnishes financial aid to parents of the children attending religious schools, over which the state has no control and which are not a part of the free public school system open to all the children of the state on equal terms. In further support of the contention that the *Cochran case* has no application to the case at bar, several decisions of the highest courts of the states (rendered since the decision in the *Cochran case*) have held invalid the furnishing of free transportation to private or parochial schools. *Gurney* v. *Ferguson*, 190 Okla. 54 (1941); *State ex rel Traub* v. *Brown*, 36 Del. 181; *Mitchell* v. *Consolidated School District*, 135 Pac. 2d 79 (1943); *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469 (1943).

5. The opinion of the Chancellor in the court below places great emphasis on the fact that New Jersey has a compulsory education law, and makes the contention that the statute here in question is complementary to, and in aid of, the compulsory education statutes. The contention is neither compelling nor persuasive. The fact that the state has a compulsory education law is no justification for violation of specific constitutional limitations, which limitations, so far as they apply to the states, are restrictions on the states as to specific acts. The separation of church and state and the restrictions on the use of public funds are fundamental and vital principles. They are not to be encroached upon to further the convenience of the state in enforcing its legitimate mandates. For example, a city may pass ordinances against littering the streets, but

it may not forbid the distribution of religious books because such distribution may have the tendency to interfere with the enforcement of such ordinances. *Schneider* v. *Irvington*, 308 U. S. 147, 161.

New Jersey furnished all of the children of the State free public schools and free transportation thereto—adequate facilities to permit all parents to comply fully with the compulsory school law. But the parents, in the case at bar, declined to use these facilities and elected to send their children to religious schools. The fact that the state has a compulsory school law is not a valid reason for *subsidizing* the parents in the exercise of their choice, particularly where that choice is on religious grounds and the payment is solely because of their religious beliefs. To do so would be to use public funds for a private purpose. Certainly, there can be no public benefit from public money spent to procure what has already been adequately provided at public expense.

6. Judicial approval has been given to the payment from public funds of the costs of transportation of children to private or parochial schools, under varying circumstances, in three States: *Maryland* (*Board of Education of Baltimore County* v. *Wheat*—May 20, 1938—199 Atl. 628, and *Adams* v. *County Commissioners of St. Mary's County*—May 26, 1942—26 Atl. 2d 377), *Kentucky* (*Nichols* v. *Henry*—November 27, 1945. Rehearing denied Feb. 8, 1946—191 S. W. 2d 930), *California* (*Bowker* v. *Baker*—March 26, 1946—167 Pac. 2d 260).

In the first Maryland case, supra, transportation was provided on regular school busses, the court emphasizing that it was the duty of the state that all school children have protection against traffic hazards and that the law in question was in furtherance of compulsory education statutes.

In the second Maryland case, supra, four years later, transportation was provided out of public funds on busses owned by the parochial schools, showing a trend from one

to the other of these cases toward enlargement of participation of the State in transporting children to parochial schools.

In *Nichols* v. *Henry, supra,* the Kentucky Court, although adhering to its decision in *Sherrard* v. *Jefferson County Board of Education, supra,* holding that public school funds cannot be used for transportation to sectarian schools, decided that, under the facts in the *Nichols case,* where there were no sidewalks along the highway the pupil is compelled to travel, the act legally authorized the use of County funds for transportation of pupils to private schools, although such transportation could not be paid out of the general funds. In addition, the decision was grounded on protection against traffic hazards and that the act was in aid of compulsory education laws.

In the case of *Bowker* v. *Baker, supra,* the action in permitting pupils of parochial schools to ride on public school busses when there were vacant seats, appears to have been based in part on the war emergency and defense program, and the further fact that the parochial schools could not obtain busses as a result of war shortages. When the seats in the public school busses were filled, no private school pupils were permitted to ride. The statute prohibited payments to parents of children in lieu of transportation. The decision emphasized the traffic hazard argument in favor of validity of the statute. In this connection, it should be emphasized that the question of traffic hazards is not involved in the case at bar, as the children traveled on public busses on their reguar schedules.

The decisions in these four cases, involving the payment of transportation of children to parochial schools, were grounded squarely on the theory that it is an exercise of the police power of the state. It is recognized as elementary that the state possesses certain power inherent in sovereignty itself—police power—to guard against, or prevent, disease, fires, immorality, etc., but such police power ends where the supreme law of the land begins. The police

power of the State must give way when it collides with specific constitutional limitations, such as the mandates of the Fourteenth and First Amendments.

Home Building Association v. *Blaisdell*, 290 U. S. 434, 78 L. Ed. 426; *Jacobson* v. *Mass.*, 197 U. S. 25; *Lochner* v. *New York*, 198 U. S. 45; *Mitchell* v. *Consolidated School Dist.*, 135 Pac. 2d 79.

Mr. Justice Frankfurter, in his concurring opinion in *Marsh* v. *Alabama*, decided January 7, 1946, a case involving freedom of religion, in referring to a State Court decision in connection with the "dedication" of certain property, said:

> "Constitutional privileges (freedom of speech and religion) having such a reach ought not to depend upon a State Court's notion of the extent of "dedication' of private property to public purposes. Local determinations of such technical matters govern controversies affecting property. But when decisions by State Courts involving local matters are so interwoven with the decision of the question of constitutional rights that one necessarily involves the other, State determination of local questions cannot control the Federal constitutional right."

7. The claim of "equal treatment" of children attending parochial schools and those attending public schools is a fallacious argument in the discussion of the relations of the state to private religious schools. The children attending parochial schools are not to be *restricted* so as to achieve "equal treatment" in the matter of public control and supervision; likewise, they are not to be *aided* in order to bring about equality with public school children; for both the *restriction* and the *aid* run counter to the absolute "separation of church and state." In matters which concern the parochial school children in connection only with their religious beliefs, the policy of the state must be "hands off," in *aid* as well as *restriction*. This is ex-

pressed by Mr. Justice Jackson in his opinion in *Board of Education* v. *Barnette, supra,* where he says:

> "The very purpose of a Bill of Rights was to *withdraw certain subjects* from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

In the same case, Mr. Justice Frankfurter, in his dissenting opinion, said:

> "The constitutional protection of religious freedom terminated disabilities, *it did not create new privileges.*"

In the several recent decisions of the Supreme Court on "religious liberty" no distinction in the constitutional sense has been made between the teaching of religion in the church and teaching religion in the schools conducted by the church, or by distribution of religious literature. Logically, there is no real distinction between the church and the religious schools, or between the church and the itinerant preacher or distributor of church pamphlets. In all such instances, the First Amendment, (as now held to be imported into the Fourteenth Amendment), imposes certain restrictions. It is, however, concerned with prohibitions only; the state *must not* prohibit the free exercise; it *must not* make any law respecting an establishment of religion. In other words, the state must not interfere with the exercise of religious practices which do not violate the laws for public order, health, safety or morals. But here the state's duty ends and also its right. The First Amendment no more requires or permits *grants* than it requires or permits *control.* If the state may use public funds to pay the bus fare of children attending religious schools then it may logically pay other expenses, such as maintenance of the school or the printing of the literature. There is no end to the things that may be done, once the right of the state to aid with public funds religious estab-

lishments or those patronizing religious establishments. In the case of religious schools, it is easy to see that such a doctrine might ultimately destroy the public school system, and would cause widespread demands for division of the school funds between the church and the state—between public schools and parochial schools. At most, the state's duty is to furnish the opportunity; the citizen in claiming the right and opportunity to exercise his religious freedom must do so at his own expense. It is interesting to note that this thought was hinted at, at least, by Mr. Justice Reed in the recent case of *Marsh* v. *Alabama*, decided in January of this year. In the dissenting opinion, in which the Chief Justice and Mr. Justice Burton joined, Mr. Justice Reed said:

> "A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, * * * but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation."

The state has performed its full duty when it has made available to all the children of the state free public schools with free transportation thereto. It may not *subsidize* with tax money the parents who elect to withdraw their children from the benefits and privileges of the universal system of public schools. Certainly, *there can be no public benefit derived from public money spent to procure what has already been adequately provided for at public expense.* If, therefore, money be appropriated to pay for a pupil's transportation to a private or parochial school, it is an appropriation of public funds for a fundamentally private purpose, regardless of whether the pupil or the private school is regarded as the beneficiary. In no true sense was the money raised for a public object.

In connection with the use of public funds for a private purpose—aid to private parochial schools, not under the control of public school authorities—it should be pointed

out that such aid will lead inevitably to some form of state control of such religious schools, and thus, more clearly and more certainly, encroach upon the cardinal principle of the separation of church and state.

Gurney v. *Ferguson*, 190 Okla. 254; 122 Pac. 2d 1002.

We close the citation of authorities in this case with a quotation, as a kind of benediction, from *Knowlton* v. *Baumhover*, (1919), 182 Iowa 691, 166 N. W. 202, in which the Court states in cogent language, which can hardly be surpassed in accuracy and clearness, the cardinal principles here contended for:

> "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.
>
> "* * * But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would *make use of any of the powers or functions of the state to promote its own growth or influence*, are un-American; they are not native to the soil; they are inconsistent with the equality of right and privileges and the freedom of conscience which are essential to the existence of a true democracy."

Finally, it is submitted that the great constitutional safeguards—the mandates of the First and Fourteenth Amend-

ments, embodying the great principles of the separation of church and state and that *public funds* may not be diverted to private uses—should not be lightly whittled away by state enactments masquerading in the garments of police power and sanctioned by the attractive, but fallacious, argument that they are in aid of compulsory education statutes. To lay with one hand the power of the government, in the form of taxation, on the property of one citizen and with the other bestow it upon another citizen in aid, directly or indirectly, of private enterprises cannot be justified under our constitutional mandates, even though it is done under the label and in the name of the public interest. The bills of rights in the American Constitution are conservatory instruments and were intended to secure old principles against abrogation and violation. We are here engaged in an effort to secure old principles from abrogation and violation by invoking the great conservatory and protective limitations of the First and Fourteenth Amendments against a law which amounts, in its practical application, to a diversion of public funds to private uses in the form of indirect aid and support of private and sectarian organizations. It is the first breach, however small, in the Ark of our Covenant that we seek to avert.

It is, therefore, respectfully submitted that the judgment of the lower Court should be reversed.

E. Hilton Jackson,
626 Woodward Building,
Washington 5, D. C.,
Attorney for the General Conference of Seventh-Day Adventists and the Joint Conference Committee on Public Relations Representing the Southern Baptist Convention, the Northern Baptist Convention, the National Baptist Convention, the National Baptist Convention, Inc. Amici Curiae.